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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

THE PEOPLE, Plaintiff and Respondent, v. ROBERT KEITH DENNIS, JR., Defendant and Appellant.	C088878 (Super. Ct. No. 62-149815)

Defendant Robert Keith Dennis, Jr., was tried on one count of second degree robbery of a bank. At trial, the primary evidence against him was the testimony of the victim and bank surveillance videos, but the court also admitted evidence of three uncharged bank robberies by defendant for purposes of showing identity, intent, absence of mistake or accident, motive, and common plan. The jury convicted defendant as charged, and the court sentenced him as a third strike offender to 25 years to life in prison, plus 11 years for the enhancements.

On appeal, defendant contends (1) the trial court erred by admitting the evidence of his uncharged crimes; (2) the trial court erred by admitting the victim's hearsay statement to police; (3) the individual and cumulative effect of the alleged errors requires reversal of the conviction; (4) his one-year prior prison term enhancement should be stricken under recently enacted Senate Bill No. 136 (2019-2020 Reg. Sess.); and (5) that defendant's fees and fines should be stricken or stayed absent proof of his ability to pay. We affirm the judgment of conviction, but conclude that defendant is entitled to have his one-year prior prison term enhancement stricken under Senate Bill No. 136, and that a limited remand is necessary for the trial court to specify the statutory bases for certain fees.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Evidence relating to the charged offense*

On August 16, 2016, just before 6:00 p.m., the victim was working as a teller at a Wells Fargo bank in Roseville. Defendant, who was wearing a white hat and a long-sleeve shirt, was waiting in line like a customer, with an envelope in his hand. When defendant reached the front of the line, he approached the victim's window, leaned on the counter with both arms, started cussing and demanding $50 and $100 bills. Although defendant's voice was relatively quiet—just loud enough for the victim to hear—the victim testified that defendant had a "very aggressive" tone in his voice and look on his face. The victim initially was startled and asked defendant if he was serious. Defendant responded, " 'Yes, this is fucking serious. I want 50s and 100s on the fucking table.' " At that point, the victim understood that he was being robbed.

The victim became concerned for his safety and the safety of others in the bank. The victim did not know what defendant would do if he refused to comply with defendant's demands. Based on his training, the victim knew his "best move" was to comply so that "no one would be hurt." The victim grabbed a handful of money from his drawer (later determined to be about $5,000) and handed it to defendant. Defendant took

the money and walked out of the bank. As soon as defendant left, the victim pressed the alarm. The bank's surveillance camera recorded the incident, and that recording was played for the jury.

Almost immediately after the incident, the victim spoke with the police and provided a description of the suspect. The victim subsequently identified defendant in a photographic lineup and at trial.

At trial, the prosecution played portions of recorded conversations that defendant had with his mother while in jail. In one conversation, defendant told his mother, "I'm going the route that there was no force or fear in the robbery." In another, defendant stated, "[H]e's gonna go talk to the victim and uh, see . . . you know, make sure he wasn't scared. That he gave me the money because it was the uh policy of the bank and not because he was scared."

B. *Evidence relating to uncharged crimes*

Before trial, the People moved to admit evidence of uncharged crimes under Evidence Code section 1101, subdivision (b). In particular, the People sought to admit evidence of three other bank robberies involving defendant: one in Lafayette on August 23, 2016; another in Sacramento on August 27, 2016; and another in Napa on August 29, 2016. For each bank robbery, there was a surveillance video of the crime and a subsequent identification of defendant by the victim of the crime. The People sought to admit the surveillance videos, the photo identifications, and the victims' testimony describing the manner in which the crimes were committed. The People argued that the evidence was relevant to show identity, intent, absence of mistake or accident, motive, and common plan, and that that the probative value of the evidence outweighed any prejudicial effects.

Defense counsel opposed the People's motion and sought to exclude any evidence of the uncharged crimes, arguing that the evidence would be cumulative and have little probative value because the defense was not contesting that defendant stole money from

the bank or that he intended to steal money from the bank. According to the defense, the only issue in dispute was whether the theft was accomplished by means of force or fear. The defense argued that the uncharged crimes had no probative value on that issue, but would be highly prejudicial to defendant.

Over the objection of defense counsel, the trial court ruled that the People could introduce evidence of the other bank robberies under Evidence Code section 1101, subdivision (b) to prove identity, intent, absence of mistake or accident, motive, and common plan. The court noted the "high degree of similarity" between the charged offense and the uncharged bank robberies. The court also concluded that the probative value of the evidence outweighed its potential for undue prejudice.

At trial, the People produced the following evidence relating to the uncharged bank robberies.

1. *August 23 robbery in Lafayette*

On August 23, 2016, Deanna V. was working as a teller at a U.S. Bank in Lafayette when a man wearing a black shirt and a hat approached her window and said he needed $50 or $100 bills. Deanna initially thought the suspect wanted to make a withdrawal, until the suspect became frustrated and told her with a stronger voice, "I'm robbing you." Deanna testified that she was in shock and scared for her safety so she began giving the suspect the money from her drawer, which consisted mostly of $20 bills. In response, defendant became more agitated and more threatening, telling her that he wanted $100 bills. Deanna handed defendant some $50 and $100 bills and some checks and told him that was all she had. She then took a step back from the window. After the suspect left, Deanna activated the alarm. The bank's surveillance camera recorded the incident, and the video was played for the jury.

Lafayette police included a photograph of defendant in a photographic lineup shown to Deanna on August 31. At first, she was unable to identify the suspect. However, after police obtained a more recent photograph of defendant and used it in a

second photographic lineup on September 15, Deanna identified defendant as the man who robbed her.

2. *August 27 robbery in Sacramento*

On August 27, 2016, T.C. was working at a U.S. Bank branch inside of a Safeway store in Sacramento when a man wearing a blue shirt and a hat approached the window, leaned over the counter, and demanded money. T.C. testified that at first he did not know what was happening, so he asked the suspect what he was saying. In a threatening and aggressive tone, the suspect said, "Give me your money." T.C. felt scared and threatened so, in accordance with his training, he gave the suspect money. The bank's surveillance cameras recorded the incident, and the video was played for the jury. After the robbery, T.C. identified defendant in a photographic lineup.

3. *August 29 robbery in Napa*

On August 29, 2016, Karen A. was working as a teller at a Wells Fargo bank in Napa when a man approached, leaned forward, handed her a piece of paper, and told her it was a robbery. The suspect demanded $50 and $100 bills. Karen testified that the suspect was quiet, but threatening, and appeared to be in a hurry. Karen was in shock and did not know what to do. The suspect seemed frustrated that she was moving too slowly and ripped off the pen attached to the window. Karen was scared that the suspect might hurt her, so she gave the suspect money from her drawer. The bank's surveillance cameras recorded the incident, and the video was played for the jury.

After the robbery, Karen was shown a photographic lineup. She identified a photograph of defendant as having exactly the same goatee and mustache color as the suspect. In court, she identified defendant as the person who robbed her.

C. *The defense*

Defendant did not testify or present a defense case. In argument to the jury, the defense did not dispute that defendant was guilty of the lesser included crime of grand theft, but argued the prosecution had failed to prove the "force or fear" element of

robbery. In support of his argument, defense counsel noted that defendant had entered the bank calmly, waited in the customer line, and quietly demanded money without showing any weapon or making any overt threats. Defense counsel argued that the victim, in surrendering the money to defendant, had simply followed his training and had not acted out of fear.

D. *Verdict and sentencing*

The jury found defendant guilty of second degree robbery (Pen. Code, § 211; count one).[1] In a bifurcated proceeding, defendant admitted two prior serious felonies within the meaning of section 667, subdivision (a)(1), and two strikes within the meaning of sections 667, subdivisions (b) through (i) and 1170.12. Defendant also admitted that he served a prior prison term within the meaning of section 667.5, subdivision (b).

The court denied a motion to remove a strike or prior serious felony, and sentenced defendant to an indeterminate term of 25 years to life in prison on count one, plus a determinate sentence of 11 years for the enhancements (five years each for the two prior serious felonies plus one year for the prior prison term). The court ordered that defendant's sentence run concurrent to a 20-year term imposed in a different proceeding. Defendant timely appealed.

DISCUSSION

I

Admission of Uncharged Crimes

Defendant contends the trial court erred by admitting evidence of uncharged crimes under Evidence Code section 1101, subdivision (b), to prove identity, intent, absence of mistake or accident, motive, and common plan. Defendant contends the evidence should have been excluded because it was irrelevant, cumulative, and unduly prejudicial. We hold that the trial court did not abuse its discretion in admitting the

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[1] Undesignated statutory references are to the Penal Code.

evidence of uncharged crimes to prove a common plan to use fear and the threat of force to rob banks, and that even if we were to assume the trial court erred in admitting the evidence for other purposes, any such error would be harmless.

A. *Background law*

As a general rule, evidence the defendant has committed crimes other than those for which he is on trial is inadmissible to prove the criminal disposition or propensity of the accused. (Evid. Code, § 1101, subd. (a).) However, Evidence Code section 1101, subdivision (b) permits evidence of a defendant's uncharged crimes when such evidence is relevant to prove some fact at issue in the case, such as identity, intent, or the existence of a common design or plan. (*People v. Lindberg* (2008) 45 Cal.4th 1, 22 (*Lindberg*).)

The relevance of the uncharged crimes is determined by the nature and degree of the similarity between such misconduct and the charged crime. (*People v. Leon* (2015) 61 Cal.4th 569, 598 (*Leon*).) "To be relevant on the issue of identity, the uncharged crimes must be highly similar to the charged offenses. [Citation.]" (*People v. Kipp* (1998) 18 Cal.4th 349, 369-370.) "[T]he uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. [Citation.]" (*People v. Ewoldt* (1994) 7 Cal.4th 380, 403 (*Ewoldt*), superseded by statute on other grounds as stated in *People v. Robertson* (2012) 208 Cal.App.4th 965, 991.) These common features need not be unique or nearly unique, but the combination of features must be " 'so unusual and distinctive as to be like a signature.' " (*Ewoldt, supra*, at p. 403; *Leon, supra*, 61 Cal.4th at pp. 598-599.)

A lesser degree of similarity is required to prove the existence of a common design or plan. (*Leon, supra*, 61 Cal.4th at p. 598.) Evidence that a defendant possessed a plan to commit the type of crime with which he or she is charged is relevant to prove the defendant employed that plan to commit the charged offense. (*People v. Balcom* (1994) 7 Cal.4th 414, 424 (*Balcom*).) To establish the existence of a common design or plan, the

common features must indicate the existence of a plan, rather than a series of similar spontaneous acts, "but the plan thus revealed need not be distinctive or unusual." (*Ewoldt, supra,* 7 Cal.4th at p. 403.) The common features need only support the inference that the defendant employed the same general plan in committing both the charged and uncharged offenses. (*Id*. at pp. 402-403.)

The least degree of similarity is required to prove intent. (*Ewoldt, supra,* 7 Cal.4th at p. 402.) For this purpose, the uncharged crimes need only be sufficiently similar to support an inference that the defendant " ' "probably harbor[ed] the same intent in each instance." ' " (*Ibid*.)

Even when the evidence of a defendant's uncharged criminal conduct is relevant to some fact at issue, to be admissible the evidence must not contravene other policies limiting admission, such as Evidence Code section 352. (*Ewoldt, supra,* 7 Cal.4th at p. 404.) Under Evidence Code section 352, the court must consider whether the probative value of the evidence is substantially outweighed by the probability that its admission would create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (Evid. Code, § 352.) Because evidence of uncharged crimes is considered inherently prejudicial, such evidence is admissible only when it has "substantial" probative value. (*People v. Foster* (2010) 50 Cal.4th 1301, 1331 (*Foster*).)

We review a trial court's rulings on admission or exclusion of evidence for abuse of discretion. (*People v. Kipp, supra,* 18 Cal.4th at p. 371.) Under this standard, a trial court's ruling will not be disturbed unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*Foster, supra,* 50 Cal.4th at pp. 1328-1329.)

B. *Analysis*

Here, the trial court allowed the prosecutor to introduce evidence of three uncharged bank robberies to prove identity, intent, lack of mistake or accident, motive, and common plan. Defendant argues that the evidence of uncharged crimes was

irrelevant because the only contested issue at trial was whether the charged crime was accomplished through fear. We disagree.

A criminal defendant cannot limit the evidence against him merely by failing to contest an element of the prosecution's case. (*People v. Earle* (2009) 172 Cal.App.4th 372, 390-391; *People v. Thornton* (2000) 85 Cal.App.4th 44, 48.) As our Supreme Court held in *People v. Rowland* (1992) 4 Cal.4th 238, 260, a plea of not guilty puts in issue all the elements of the charged offense and they remain at issue until they are resolved. (Accord, *Thornton, supra,* at pp. 48-49; *Lindberg, supra,* 45 Cal.4th at p. 23; *People v. Whisenhunt* (2008) 44 Cal.4th 174, 204.) The prosecution is not required to forgo the use of relevant evidence to prove an element of a crime merely because that element might also be established through other evidence. (*People v. Tran* (2011) 51 Cal.4th 1040, 1048-1049.)

In the instant case, there was no stipulation narrowing the prosecution's burden of proof. Accordingly, the prosecution had the burden of proving all the elements of the charged crime, including that defendant took the property using force or fear, with a felonious intent. (§ 211.) The evidence of defendant's uncharged bank robberies was relevant, at a minimum, to prove a common plan to use fear and the threat of force to take property.

Defendant argues that even if relevant, the evidence should have been excluded as cumulative on issues that were not reasonably subject to dispute, and therefore the limited probative value of the evidence was substantially outweighed by its prejudicial effect. (*Balcom, supra*, 7 Cal.4th at 423**;** accord, *People v. Earle, supra,* 172 Cal.App.4th at p. 391.)

We conclude the trial court did not abuse its discretion in admitting the uncharged crimes to prove a common plan. As explained above, evidence of a common design or plan is relevant to prove a defendant engaged in the conduct alleged to constitute the charged offense. (*Ewoldt, supra*, 7 Cal.4th at p. 394.) The charged offense in this case is

robbery. The act of robbery is the taking of another's property against his or her will *by force or fear*. (*People v. Anderson* (2011) 51 Cal.4th 989, 994; *People v. Corpening* (2016) 2 Cal.5th 307, 313-314 & fn. 3.)

Although defendant did not contest that he took the bank's money, he vigorously disputed that the taking was accomplished using force or fear. Thus, far from being "obvious and conceded," defendant's conduct was, in fact, the key contested issue at trial.

Defendant argues that because fear relates to the victim's subjective state of mind, only the victim's testimony was probative on that issue. We disagree. Defendant is correct that to establish a robbery was committed by means of fear, the prosecution must show that the victim was afraid, and that such fear allowed the crime to be accomplished. (*People v. Montalvo* (2019) 36 Cal.App.5th 597, 612; see also § 212.) But direct evidence of a victim's fear is not required. (*Montalvo, supra*, at p. 612.) A victim's fear may be proved by circumstantial evidence. (*People v. Holt* (1997) 15 Cal.4th 619, 690.) Indeed, the jury may infer fear from the circumstances in which the property is taken even if the victim testifies that he or she was not afraid. (*People v. Morehead* (2011) 191 Cal.App.4th 765, 775 (*Morehead*).)

Intimidation of the victim equates with fear. (*Morehead, supra,* 191 Cal.App.4th at p. 775.) Where intimidation is relied upon, it can be established by conduct, words, or circumstances reasonably calculated to produce fear. (*People v. Bordelon* (2008) 162 Cal.App.4th 1311, 1319.) "An unlawful demand can convey an implied threat of harm for failure to comply, thus supporting an inference of the requisite fear. [Citation.]" (*Morehead,* at p. 775.)

In this case, the similarities between the charged and uncharged robberies supported an inference that defendant committed the charged offense pursuant to a common plan to rob banks using fear. In each instance, defendant posed as a bank customer, quietly approached a teller, and demanded money. In three of the four crimes, defendant specifically demanded $50 and $100 bills. Although defendant never

brandished a weapon or made any overt threats, in each instance he exhibited aggressive or threatening body language or tone of voice, sufficient to cause each teller to fear for his or her safety and comply with his demands. All of the robberies were committed within a two-week period of time and within driving distance of two and a half hours from defendant's Oroville home. Video surveillance footage supported the conclusion that all the robberies were committed by the same person, and each teller subsequently identified defendant as the robber. Viewing the evidence in the light most favorable to the trial court's ruling, the evidence supported an inference that defendant committed the charged offense pursuant to a common plan.

It follows that the evidence of defendant's uncharged crimes had substantial probative value with respect to the element of fear. Evidence that defendant used fear or intimidation to commit the other bank robberies reasonably supported an inference that defendant also used fear or intimidation to commit the charged offense. (*Foster, supra*, 50 Cal.4th at pp. 1326-1337 [evidence of plan to commit robberies and assaults supported finding the defendant acted in accordance with that plan]; *Balcom, supra*, 7 Cal.4th at pp. 418, 423-427 [uncharged rape and robbery admissible to demonstrate the defendant committed rape and robbery pursuant to plan]; see also *Lindberg, supra*, 45 Cal.4th at pp. 25-26 [evidence of uncharged robberies involving assault could assist jurors in determining whether victim was assaulted during robbery attempt].) The probative value of the evidence was increased by the close proximity in time of the charged and uncharged crimes, and by the fact the uncharged crimes emanated from sources independent of the charged offense. (*Balcom*, at p. 427.)

Although there was potential prejudice, increased somewhat because the jury did not know whether the uncharged crimes resulted in convictions (*People v. Tran, supra*, 51 Cal.4th at p. 1047), we do not find the evidence to be significantly more inflammatory

than the testimony concerning the charged offense.[2] Moreover, any risk that the jury would misuse the evidence for an improper character purpose was addressed by the court's instructions, which conveyed to the jury that the evidence could not be considered to prove defendant's bad character or criminal disposition. (*People v. Scheer* (1998) 68 Cal.App.4th 1009, 1023; see also *Foster, supra*, 50 Cal.4th at pp. 1336-1337 [it is presumed that the jury understood and followed the court's instructions].) Under the totality of the circumstances, we conclude the trial court did not abuse its discretion in finding that the evidence was admissible to prove a common plan because its probative value outweighed its potential for undue prejudice. (See *Leon, supra*, 61 Cal.4th at p. 599.)

We need not decide whether the evidence of defendant's uncharged crimes also was admissible to prove identity, intent, absence of mistake or accident, or motive, because even if we were to assume the trial court erred, any error would be harmless. We review error in the admission of the evidence using the standard of *People v. Watson* (1956) 46 Cal.2d 818.[3] (*Foster, supra*, 50 Cal.4th at p. 1333; *Lindberg, supra*, 45 Cal.4th at p. 26.) Under the *Watson* standard, reversal is warranted only where it is reasonably probable a result more favorable to the defendant would have been reached absent the erroneous admission of the evidence. (*People v. Watson, supra*, 46 Cal.2d at p. 836.)

On the record before this court, we see no reasonable probability of a more favorable result. First, because the evidence was admissible to prove a common plan, the jury would have heard the evidence even if the court had not admitted it to establish

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[2] In the charged offense, the victim testified that defendant was cussing and "very aggressive" in demeanor and tone. In the uncharged crimes, defendant was described as "demanding," "agitated," "aggressive," "frustrated," and "threatening."

[3] This is not one of those rare cases where the admission of evidence violated federal due process and rendered defendant's trial fundamentally unfair. (*Lindberg, supra*, 45 Cal.4th at p. 26; cf. *People v. Albarran* (2007) 149 Cal.App.4th 214, 232.)

identity, intent, or motive. Second, the court properly instructed the jury to consider the evidence only for the limited purposes for which it was admitted, and not to show defendant's bad character or propensity for crime. Finally, on the issues of identity, intent, and motive the evidence against defendant was overwhelming. Accordingly, we have no doubt the jury would have reached the same result even if it had been instructed not to consider the evidence for the purpose of proving defendant's identity, intent, or motive.

II

Admission of the Victim's Hearsay Statement

At trial, the victim testified that immediately after the robbery he spoke with a police officer and described what happened, but the victim was not asked whether he told the officer he was afraid during the robbery. Later, the prosecution called the officer who spoke to the victim at the crime scene, and asked the officer if the victim told him how he felt during the crime. Defense counsel objected to the question as "improper impeachment," which the court overruled. The officer then testified that the victim had said "he was nervous and afraid that [the suspect] had a weapon."

On appeal, defendant argues the trial court erred by admitting the victim's hearsay statement to the police. The People assert that defendant forfeited the claim by failing to raise a hearsay objection below.[4] We agree with the People.

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[4] During a later break in the trial, defense counsel expanded on his argument that the evidence should have been excluded as "improper impeachment." Defense counsel argued that because the victim was not asked on direct examination whether he told the officer that he was nervous and afraid, asking the officer to supply that information was "improper impeachment. It would be hearsay evidence, and I think that it was not properly brought out in front of this jury." In response, the prosecutor argued the statement was admissible as a prior consistent statement because defense counsel would argue that the victim was not actually afraid. The court explained that it "ruled on the objection as it was heard," and that there "was no specific hearsay objection, just an objection based on improper impeachment . . . ." We find no error. Although

Pursuant to Evidence Code section 353, a judgment will not be reversed due to the erroneous admission of evidence unless the record contains a timely and specific objection to the evidence on the ground sought to be urged on appeal. (Evid. Code, § 353; *People v. Ortiz* (1969) 276 Cal.App.2d 1, 6.) We conclude that an objection of "improper impeachment," which relates to the credibility of a witness, is not sufficient to preserve a claim of hearsay for purposes of appeal. (See Evid. Code, § 353; *People v. Price* (1991) 1 Cal.4th 324, 429-430, superseded by statute on other grounds as stated in *People v. Hinks* (1997) 58 Cal.App.4th 1157, 1161; *People v. Wheeler* (1992) 4 Cal.4th 284, 300, superseded by statute on other grounds as stated in *People v. Duran* (2002) 97 Cal.App.4th 1448, 1460.) Thus, defendant forfeited his hearsay claim by failing to raise the objection below.

Anticipating forfeiture, defendant argues that his counsel's failure to assert a hearsay objection constituted ineffective assistance of counsel. We are not persuaded. To establish ineffective assistance of counsel, a defendant must show by a preponderance of the evidence that counsel's action was both (1) deficient under prevailing professional norms, and (2) prejudicial—i.e., that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 693-694 [80 L.Ed.2d 674, 693-694, 697-698]; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.)

In this case, it is unnecessary to consider whether counsel's performance was deficient because even if counsel had objected and the court had sustained the objection, it is not reasonably probable that the result of the proceeding would have been any different. Although defendant characterizes the victim's out-of-court statement as a "key

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defendant's subsequent reference to hearsay could be construed as a hearsay objection, it came too late. (*People v. Partida* (2005) 37 Cal.4th 428, 433-434 [evidentiary objections must be specific and timely]; *People v. Perry* (1972) 7 Cal.3d 756, 781 [subsequent motion to strike not sufficient].)

piece of evidence," we do not. Regardless of whether the victim was afraid defendant had a weapon, the victim was concerned for his safety and the safety of others in the bank. The victim testified that he perceived defendant as "[v]ery aggressive," and complied with defendant's demands because he knew defendant was serious and believed compliance was the best option to ensure "no one would be hurt." This by itself was strong evidence that defendant was guilty of robbery. (*Morehead, supra*, 191 Cal.App.4th at p. 775; *People v. Bordelon, supra*, 162 Cal.App.4th at p. 1319.) The jury also could consider defendant's uncharged crimes as circumstantial evidence that defendant used fear to rob the bank pursuant to a common plan to use fear to rob banks. It is not reasonably probable the jury would have reached a different result had the out-of-court statement been excluded. Thus, we reject defendant's claim of ineffective assistance of counsel.

III

Cumulative Prejudice

Defendant contends the cumulative effect of the trial court's errors resulted in a fundamentally unfair trial. We have either rejected defendant's claims of error or found any assumed error to be nonprejudicial on an individual basis. We do not find his assertion of cumulative prejudice to be any more compelling.

IV

Senate Bill No. 136

Defendant contends that his one-year prior prison term enhancement should be stricken in light of Senate Bill No. 136 (2019-2020 Reg. Sess.). (Stats. 2019. ch. 590, § 1.) The People agree, as do we.

Senate Bill No. 136, which became effective on January 1, 2020, amended section 667.5, subdivision (b) to limit the circumstances under which a one-year prior prison term enhancement may be imposed (2019-2020 Reg. Sess.). (Stats. 2019, ch. 590, § 1.) As amended, such enhancements are authorized only if the prior prison term involves a

conviction of a sexually violent offense. (§ 667.5, subd. (b).) Because defendant's prior prison term enhancement was not based on a sexually violent offense, defendant is entitled to the benefit of the statute if it applies retroactively to his case.

We agree with the parties that under the rule of *In re Estrada* (1965) 63 Cal.2d 740, Senate Bill No. 136 applies retroactively to cases not yet final as of its effective date. (*People v. Jennings* (2019) 42 Cal.App.5th 664, 682; *People v. Winn* (2020) 44 Cal.App.5th 859, 872-873.) Because defendant's judgment is not yet final, the amended law applies retroactively to his case. Accordingly, we conclude that defendant's prior prison term enhancement must be stricken.

V

Fines and Fees

At sentencing, the trial court imposed the following fines and fees: a $10,000 restitution fine (§ 1202.4, subd. (b)); a $10,000 (suspended) parole revocation fine (§ 1202.45); a $40 court operations assessment (§ 1465.8); a $30 court facilities assessment (Gov. Code, § 70373); a $553 main jail booking fee; a $350 presentence investigation report fee; and a $172 incarceration fee.[5] Arguing that defendant is unemployed and would be unable to pay the fines and fees "for a significant period of time," defense counsel requested the fines and fees be stayed or stricken, but the trial court denied his request.

On appeal, defendant argues that the fines and fees should be reduced to the minimum mandatory amounts ($370) because the record does not support an implied finding of defendant's ability to pay more than the statutory minimum. Defendant further argues that if the fines and fees are not reduced to the statutory minimum amounts, then

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[5] The court imposed the main jail booking fee, presentence investigation fee, and incarceration fee without specifying their statutory bases.

the fines and fees should be stayed under *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*).

A. *Sufficiency of the evidence*

We reject defendant's request to reduce his $10,000 restitution fine. Section 1202.4, subdivision (b) provides that where a defendant is convicted of a felony, the amount of the restitution fine shall be set, at the discretion of the court, between $300 and $10,000, "commensurate with the seriousness of the offense." (§ 1202.4, subd. (b)(1).) In setting a fine above the minimum amount, the court shall consider "any relevant factors." (§ 1202.4, subd. (d).) While a defendant's inability to pay is a relevant factor, a trial court also may consider other factors, such as the seriousness and gravity of the offense, the circumstances of the crime, and any economic gain derived by the defendant as a result of the crime. (§ 1202.4, subd. (d).) While a defendant's inability to pay might weigh against imposition of the statutory maximum, other factors may strongly weigh in favor. (*People v. Sweeney* (2014) 228 Cal.App.4th 142, 155.) Express findings by the court as to the factors bearing on the amount of the fine, including ability to pay, are not required. (§ 1202.4, subd. (d).)

The statute expressly places the burden on the defendant to prove his or her inability to pay. (§ 1202.4, subd. (d).) In the absence of a contrary showing, the court may presume that the defendant has the ability to pay the restitution fine out of future earnings, including prison wages. (*People v. Urbano* (2005) 128 Cal.App.4th 396, 405; accord, *People v. DeFrance* (2008) 167 Cal.App.4th 486, 505; see also *People v. Aviles* (2019) 39 Cal.App.5th 1055, 1076 (*Aviles*); § 1202.4, subd. (d).)

Here, defendant offered no evidence concerning his inability to pay the fine other than defense counsel's statement, derived from the probation report, that defendant was unemployed. This was not enough to overcome the presumption that defendant had the ability to pay or to show that the trial court abused its discretion in ordering defendant to pay the maximum restitution fine. (*People v. DeFrance*, *supra*, 167 Cal.App.4th at p.

505; *People v. Gamache* (2010) 48 Cal.4th 347, 409.) Thus, we deny defendant's request to strike the discretionary amount of his restitution fine.

As for the other challenged fees—the booking fee, presentence investigation report fee, and incarceration fee—we conclude that remand is required because, as the People concede, the trial court has failed to specify the statutory bases for the fees. Trial courts must include in their judgments the statutory basis for every fine or fee imposed. "Although we recognize that a detailed recitation of all the fees, fines and penalties on the record may be tedious, California law does not authorize shortcuts." (*People v. High* (2004) 119 Cal.App.4th 1192, 1200; accord, *People v. Eddards* (2008) 162 Cal.App.4th 712, 717.) Here, the trial court's oral pronouncement of judgment does not specify the statutory basis for the booking fee, presentence investigation report fee, or incarceration fee. Nor is such information provided in the probation report, the trial court's minute order, or the abstract of judgment. Without identification of the statutory bases for the fees, we can only speculate whether the fees were properly calculated and imposed. We conclude therefore that a limited remand is necessary for the trial court to clarify its sentencing order.

B. Dueñas

Defendant does not argue that imposition of the mandatory minimum fines and fees would violate due process. Nevertheless, if the fines and fees are not reduced to the statutory minimum, defendant argues that under *Dueñas, supra,* 30 Cal.App.5th 1157, due process requires that all the fines and fees be stayed unless the People demonstrate defendant has the ability to pay them.

The People respond that defendant forfeited his claim by failing to raise it below. They also argue that defendant has no due process right to an ability to pay hearing for punitive fines. The People do not oppose a limited remand for an ability to pay hearing on the nonpunitive fees imposed.

We conclude defendant did not forfeit his *Dueñas* claim by failing to raise it in the trial court. Contrary to what the People assert, defendant was sentenced on January 4, 2019, several days *before* publication of the opinion in *Dueñas.* (*Duenas, supra,* 30 Cal.App.5th 1157.) Because *Dueñas* represented an unforeseen significant shift in the law that could not have been anticipated, defendant's failure to raise the issue at sentencing is excused. (*People v. Turner* (1990) 50 Cal.3d 668, 703.) Nevertheless, we conclude defendant's reliance on *Dueñas* is misplaced.

In *Dueñas*, an unemployed mother with cerebral palsy surviving on public assistance had her driver's license suspended because she was unable to pay $1,088 assessed against her for three juvenile citations. (*Dueñas, supra,* 30 Cal.App.5th at pp. 1160-1161.) Thereafter she received multiple convictions related to driving with a suspended license, each accompanied by jail time and additional fines and fees that she could not pay. (*Id*. at p. 1161.) When she requested a hearing to determine her ability to pay mandatory fines and fees imposed under sections 1202.4, 1465.8, and Government Code section 70373, the trial court refused, ruling that the fines and fees were not subject to an ability to pay determination. (*Id*. at pp. 1162-1163.)

On appeal, the Court of Appeal reversed, holding that due process required the trial court to ascertain the defendant's present ability to pay before imposing the fines and fees. (*Dueñas, supra*, 30 Cal.App.5th at p. 1164.) To support this conclusion, *Dueñas* relied on two lines of authority. First, it cited authorities addressing access to courts and waiving court costs for indigent civil litigants. Second, it relied on due process and equal protection authorities that prohibit incarceration or other limitations of rights based solely on a defendant's indigence. (*Id.* at pp. 1165-1172.)

Reactions to *Dueñas* have been mixed. Although some courts have followed its reasoning, others have strictly limited it to its facts or simply found that it was wrongly decided. (See *People v. Belloso* (2019) 42 Cal.App.5th 647, 649, review granted Mar. 11, 2020, S259755 [discussing split]; *People v. Taylor* (2019) 43 Cal.App.5th 390, 398

[same].) Our Supreme Court is now poised to resolve this question, having granted review in *People v. Kopp* (2019) 38 Cal.App.5th 47 (review granted Nov. 13, 2019, S257844), which followed *Dueñas* in part. (*Kopp, supra*, at pp. 94-97.) In the meantime, we join those authorities that have refused to follow it. (See, e.g., *People v. Hicks* (2019) 40 Cal.App.5th 320, 322, 327-329, review granted Nov. 26, 2019, S258946; *Aviles, supra*, 39 Cal.App.5th at pp. 1067-1069; *People v. Caceres* (2019) 39 Cal.App.5th 917, 926-929; *People v. Kingston* (2019) 41 Cal.App.5th 272, 279-281.)

When a defendant raises a constitutional challenge to a statutorily mandated fine or fee based on his or her inability to pay, we conclude such challenge is properly analyzed under the excessive fines clause. (*Aviles, supra*, 39 Cal.App.5th at p. 1069.) Because defendant has not properly raised such a challenge in this case, we need not address whether the fines and fees imposed on him are unconstitutionally excessive.[6] It is enough to conclude that defendant's *Dueñas* claims are unavailing.

DISPOSITION

The matter is remanded to the trial court with directions to (1) strike the one-year prior prison term enhancement under section 667.5, and (2) reconsider whether the $553 booking fee, $350 presentence investigation report fee, and $172 incarceration fee were properly imposed and, if so, separately identify the amount and statutory basis for each fee. The trial court is further directed to prepare an amended abstract of judgment and to

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[6] We need not consider the perfunctory argument raised in a single sentence in defendant's reply brief. (*People v. Carroll* (2014) 222 Cal.App.4th 1406, 1412, fn. 5; *Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335, fn. 8.)

forward a certified copy to the Department of Corrections and Rehabilitation. Defendant's conviction is otherwise affirmed.

KRAUSE, J.

We concur:

HULL, Acting P. J.

DUARTE, J.